Filed 11/9/09 In re O.T. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re O.T. et al., Persons Coming Under the Juvenile Court Law.	
SAN BERNARDINO COUNTY CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. L.M., Defendant and Appellant.	E048745 (Super.Ct.No. J217939, J217940, J217941 & J217942) O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Wilfred J. Schneider, Jr., Judge. Affirmed.

Leslie A. Barry, under appointment by the Court of Appeal, for Defendant and Appellant.

Ruth E. Stringer, County Counsel, and Adam E. Ebright, Deputy County Counsel, for Plaintiff and Respondent.

L.M. (Mother) appeals from orders terminating her parental rights concerning two of her children, A.M. and O.T., pursuant to section 366.26 of the Welfare and Institutions Code.[1] She contends the court abused its discretion in finding that the children were adoptable. Because there is substantial evidence to support the court's adoptability findings, we affirm the court's orders.

I. SUMMARY OF FACTS AND PROCEDURAL HISTORY

A. *Background*

O.T. and A.M. were taken into protective custody by San Bernardino County Children and Family Services (CFS)[2] on October 30, 2007.[3] The action was taken because of Mother's drug use and failure to cooperate with family maintenance services provided by CFS. At that time, O.T. was seven months old and A.M. was nine days shy of her second birthday. They were placed in foster care.

CFS filed petitions concerning the children pursuant to section 300. Following a hearing, the juvenile court ruled that it had jurisdiction over the children based in part upon Mother's history of drug and alcohol use, her refusal to comply with drug and alcohol treatment programs, and her failure to provide for the children as a result of her

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

[2] CFS was formerly known as the San Bernardino County Department of Children's Services.

[3] Two other children of Mother's were taken into custody at the same time. These two other children are not subjects of this appeal.

substance abuse. The children were declared dependents of the court and removed from Mother's custody. The court ordered Mother to participate in a reunification plan that involved parenting education, counseling, and substance abuse testing.

In CFS's jurisdictional/dispositional report, the social worker stated that other than an old burn mark on her leg, A.M. had no known medical issues. She did, however, gorge when eating and "whines a lot." O.T. is described as an infant that cries a lot and demands attention and to be held. He also gorges himself when eating. The social worker reported that he had no known medical problems. Under the heading of past health issues, both children were described, based upon Mother's report, as being at risk for developmental delays, behavior disorders, and learning disorders.

In the initial report to the court for the six-month review hearing, the social worker reported that Mother had not made significant efforts to complete her case plan requirements and failed to drug test. In the social worker's opinion, Mother "has shown that she is unwilling and unable, to make the necessary changes to have her children returned to her care. . . . [Mother's] addiction to debilitating drugs and/or alcohol precludes her ability to be a responsible parent." CFS recommended that reunification services be terminated and that a section 366.26 hearing be set.

A.M. is described in the six-month report as a "healthy child" and "developmentally on task for her age"; she "is a very active playful child. Her personality is out going and friendly. She enjoys playing with children her age and social functions." However, the social worker added that she "does have temper tantrums when

she does not get her way"; and she "throws herself on the ground, and at times throws objects across the room." The social worker also stated that A.M. "does frustrate easily, but is able to be re-directed."

O.T. was diagnosed as having gastroesophageal reflux disease (GERD), which causes him to vomit. He is described as being "slightly delayed developmentally," and "small for his age." He also has features of fetal alcohol syndrome (FAS) "[c]ombined with unpredictable extreme mood swings, impulsiveness, attention deficit, irresponsibility, [and] [d]ifficulty taking social cues."

The foster parents for A.M. and O.T. told the social worker that the children "require consistent monitoring. Both have poor boundaries, demand attention, and have poor social skills. [A.M.] has delayed verbal skills. [O.T.] has multiple medical issues. [O.T.] has a problem of throwing up his milk after a feeding . . . ." The foster parents further reported that "the children require constant instruction and guidance."

In an addendum report submitted prior to the six-month review hearing, CFS changed its recommendation to allow reunification services to continue. According to the social worker, Mother "now realizes the seriousness of the situation" and "is willing to make a commitment to address her drug abuse issues."

At the six-month review hearing, the court found that Mother had failed to participate regularly and make substantive progress in her case plan. However, the court did not terminate reunification services, and ordered her to participate in a revised plan.

In the status report for the 12-month review hearing, the social worker reported that Mother did not make significant efforts to complete her plan requirements and failed to drug test on a regular basis. According to the social worker, Mother's "addiction to debilitating drugs and/or alcohol precludes her ability to be a responsible parent." CFS recommended that her reunification services be terminated and a section 366.26 hearing be set.

In the 12-month status report, the social worker described A.M. as "developmentally delayed for her age"; yet, she has also "made significant improvements developmentally" in the last six months. She is again described as "playful," "out going and friendly," and subject to "temper tantrums when she does not get her way." She "lacks significant vocabulary," can name objects, but does not count. As in the previous report, she "does frustrate easily, but is able to be re-directed."

O.T. still appeared "to be slightly delayed developmentally." He had trouble feeding himself and "repeatedly hits his head on the back of the chair." His GERD diagnosis and possible FAS were again noted.

In an addendum report, the social worker reported that a doctor had diagnosed A.M. "as having poor impulse control, developmental delays in language, speech." The doctor also diagnosed O.T. as having signs and symptoms consistent with FAS and may have a genetic disorder in conjunction with FAS. The social worker stated that the children have "begun to display numerous developmental issues. . . . [T]he children have

some form of physical, mental, or emotional condition that will require medical and/or therapy for an undetermined amount of time."

At the 12-month review hearing, the court terminated reunification services and set a hearing to be held pursuant to section 366.26.

B. *Section 366.26 Hearing*

At the section 366.26 hearing, a section 366.26 report and an adoption assessment report were admitted into evidence. In the section 366.26 report, the social workers reported that A.M. was placed with prospective adoptive parents in March 2009, and is "in good physical health." Regarding A.M.'s development, they stated: "[A.M.] has improved developmentally over the past six (6) month reporting period. [She] can do simpl[e] problem solving, memory for imitating past events, [i]ndependent, attachment to caregivers, and pretend play. [A.M.] is a very active playful child. Her personality is out going and friendly. She enjoys playing with children her age and social functions. [A.M.] does have temper tantrums when she does not get her way, which has improved. Over this past six (6) month reporting period [A.M.] has made significant improvements developmentally. Physical development: Child can walk on tiptoes, jump with both feet, walk downstairs, skip and throw ball overhand. Language development: [A.M.] lacks significant vocabulary; she has between 50 – 100 words. Child answers questions, but does not use brief sentences. Names a few objects, but does not count. Lacks socialized speech. Cognitive development: Not yet able to manipulate letters, numbers. Child has begun to recognize colors, and numbers. Emotional development: Autonomy,

attachment to primary caregivers, less intense in new environments. Psychosocial development: Child has social play, interest in relating to others, prefers relationship with identified individuals. [A.M.] has a problem sharing with other children. Child takes toys from other children. [Child] has begun testing to assist developmental delays. Child is average or above in most areas of testing. This progress is associated to being placed in perspective adoptive home. Child receives one on one attention and support from adoptive parents. [A.M.'s] unique personal[ity] has open[ed] up since new placement."

Regarding O.T., the social workers reported that O.T. was placed in a prospective adoptive home in February 2009. Regarding his medical condition, the social workers noted his previous diagnosis for GERD and added the following: "[O.T.] is small for his age, his arms and legs are short for his body size. A bone disorder is in [O.T.'s] family history. Doctor's visit on 03/20/09 confirmed FAS diagnosis, b/1 metataras abducts, poss. Gerd, left unde[s]cended testis and developmental delays." His developmental status is described as follows: "Child has global developmental delays. Child is being assessed for dwarfism. Child has been referred to Valley Regional Center. Child can not feed himself, has speech delayed, poor impulse control, obsessive behaviors, he tends to perseverate on objects or his body. Child has temper tantrums, 4 – 5 times per week. His tantrums include: hitting, throwing things, pinching, scratching and spitting. Child seems to have orthopedic problems with his feet. His big toes appear to bend to the side and back. When child attempts to walk he sometimes walks on his toes. Child must have

specially prepared foods, because of his sensitive digestive system. NO milk products. Child cannot feed himself and often spits up in his mouth. New environments over stimulate child and he becomes anxious and upset." The social workers added that O.T. "has emotional delay issues and will need therapy when age appropriate."

In the adoption assessment report, the social workers reported that since being placed with her prospective adoptive family, A.M. is "so different, in so many positive ways." She is learning new things, talkative, and "surprisingly compliant to commands and directions." "She has blossomed," the social workers reported, and "has a personality now." Regarding her medical condition, the social workers noted concerns about possible vision and hearing problems and treatment for ringworm. However, they conclude that she "does not appear to be in any distress and is usually a healthy child." A.M. was "making strides in development," including speaking in complete sentences, talking with others, and wanting to learn. She has, according to the social workers, "adapted to her new adoptive family and environment so quickly." She has scored above average and average in tests and "appears to be a normal three year-old." Regarding her mental and emotional status, the social workers reported that "[A.M.] now appears to be a happy, well-adjusted little girl and presents as a normal child. She is characterized as very nice looking, and is now an extrovert! She is talkative and easygoing. She calls her new adoptive parents 'daddy' and 'mommy.' . . . She is a '. . . happy, energetic child.'"

A.M. has "made a positive adjustment at the current placement and has developed a significant attachment with the prospective adoptive parents." Regarding the

prospective adoptive parents, the social workers report that they "are willing, able and committed to meet the needs of child, [A.M.], on a permanent basis. They appear to be stable, strong, nurturing, honest and dependable individuals who feel that they are the best parents for this child. They further stated that they love her very much, she is a part of their lives, and they could not imagine life without her anymore."

The social workers reported that O.T. has FAS and will need ongoing care for the rest of his life. The care would include "ongoing special education, speech therapy, life skills supports, and work supports. He has at least a 90% chance of developing some sort of mental health issue. He will need ongoing Occupational/Physical Therapies and medical care." It is also possible that he has dwarfism. He is "developmentally delayed both physically and mentally. . . . [He] cannot feed himself with a spoon or fork, he has both gross and fine motor delays, he is speech delayed, he has many sensory issues, he is easily distracted and has a tendency to perseverate on things." Other medical issues include a problem with his right eye, orthopedic issues with his feet and possibly his hips, and a very sensitive digestive system. O.T. is "below normal intelligence and is developmentally delayed." He has frequent tantrums and will occasionally cry uncontrollably.

O.T.'s prospective adoptive parents previously adopted two children with FAS. They became educated about FAS and competent in taking care of their adopted FAS children. They have attended numerous classes and conferences, read books, watched videos, and participated in support groups concerning FAS and developmentally

challenged children. According to the social worker, the prospective adoptive parents "feel that they are called to this," and specifically requested to adopt another FAS child. The social worker stated that they "are remarkable, loving, caring and giving people." O.T. "has developed an emotional bond with the prospective adoptive parents" and their relationship "is that of parents and child in every way."

At the hearing, Mother was not present in court. Her counsel objected to the adoption of A.M. and O.T., but offered no evidence or argument. After consideration of the reports, the court stated that there is clear and convincing evidence that the children will be adopted and terminated Mother's parental rights.

II. ANALYSIS

In order for a juvenile court to terminate parental rights, it must find by clear and convincing evidence that the child will likely be adopted. (§ 366.26, subd. (c)(1).) We will uphold the juvenile court's finding if the record contains substantial evidence from which a reasonable trier of fact could find clear and convincing evidence that the child was likely to be adopted. (*In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1153-1154.) """'Clear and convincing' evidence requires a finding of high probability. The evidence must be so clear as to leave no substantial doubt. It must be sufficiently strong to command the unhesitating assent of every reasonable mind. [Citations.]"' [Citations.]" (*In re Jerome D.* (2000) 84 Cal.App.4th 1200, 1205.) Still, we "'presume in favor of the order, considering the evidence in the light most favorable to the prevailing party, giving

the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order.' [Citation.]" (*In re Josue G.* (2003) 106 Cal.App.4th 725, 732.)

"The issue of adoptability requires the court to focus on the child, and whether the child's age, physical condition, and emotional state make it difficult to find a person willing to adopt. [Citations.]" (*In re Brian P.* (2002) 99 Cal.App.4th 616, 624.) "[T]here must be convincing evidence of the likelihood that adoption will take place within a reasonable time. [Citation.]" (*Ibid.*) It is not necessary that the child already be placed in a preadoptive home, or that a proposed adoptive parent be waiting. (§ 366.26, subd. (c)(1); *In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649.) Nevertheless, "the fact that a prospective adoptive parent has expressed interest in adopting the minor is evidence that the minor's age, physical condition, mental state, and other matters relating to the child are not likely to dissuade individuals from adopting the minor. In other words, a prospective adoptive parent's willingness to adopt generally indicates the minor is likely to be adopted within a reasonable time either by the prospective adoptive parent *or by some other family*. [Citation.]" (*In re Sarah M., supra*, at pp. 1649-1650.) "When a child is deemed adoptable only because a particular caretaker is willing to adopt, the analysis shifts from evaluating the characteristics of the child to whether there is any legal impediment to the prospective adoptive parent's adoption and whether he or she is able to meet the needs of the child." (*In re Helen W.* (2007) 150 Cal.App.4th 71, 80; see also *In re Carl R.* (2005) 128 Cal.App.4th 1051, 1061.)

There is ample evidence to support the court's finding that A.M. is adoptable. She was three years old at the time of the section 366.26 hearing. By the time of the hearing, concerns about her health had been alleviated, she was eating healthier, and was at near normal weight levels. She is described in the adoption assessment as "usually a healthy child." Relative to her mental and emotional status, A.M. is described as "a happy, well-adjusted little girl and presents as a normal child." She scores at or above average on tests, is "very nice looking," "easygoing," and "energetic." She has been living with prospective adoptive parents who have made her "a part of their lives" and "love her very much." The court's finding of adoptability as to A.M. is strongly supported by the record. (See *In re I.I.* (2008) 168 Cal.App.4th 857, 870-871 [Fourth Dist., Div. Two].)

Mother states that "[A.M.] has significant developmental delays which require Regional Center services," and has "poor impulse control and violent tempers and require[s] constant supervision." These and other examples of problem behavior are supported by references to status review reports prepared prior to the section 366.26 report and adoption assessment. As the social workers noted in the more recent reports, however, A.M. has made great strides in her development since being placed with her prospective adoptive parents. Even if prior status reports had been admitted into evidence at the section 366.26 hearing, they would have had little relevance on the issue of adoptability in light of the more recent assessment. Moreover, even if the prior reports might have carried some weight in the trial court, we do not reweigh the evidence on appeal. Our task is to determine whether there is substantial evidence to support the trial

court's adoptability findings. As set forth above, the finding as to A.M. is well supported by the record.

Although the adoptability of O.T. is a more difficult issue, we conclude that the evidence is sufficient to support the court's finding as to him as well. CFS determined that it was likely that O.T. would be adopted because of his young age and the desire by his caretakers to adopt him. O.T. was two years old at the time of the hearing. Although his FAS diagnosis and related medical and developmental issues undoubtedly negatively affect O.T.'s adoptability, O.T. is fortunate to be placed with prospective adoptive parents who not only desire to adopt him, but who have previously adopted two other FAS children, been trained to deal with FAS, and specifically requested a child with FAS. According to the social worker, the "prospective adoptive parents are willing, able and committed to meet the needs of [O.T.] on a permanent basis. They appear to be stable, strong, nurturing, honest and dependable individuals who feel that they are the best parents for this child. They further stated that they love him very much, he is a part of their lives, and they could not imagine life without him anymore." Mother has not identified any legal impediment to the prospective adoptive parents' ability to adopt O.T. Nor does the record disclose any such impediment. Neither parent has any criminal history "or hits in the Child Abuse Index, FBI, or CMS." Thus, even if the sole basis for finding that O.T. is adoptable was the willingness of the prospective adoptive parents to adopt him, the record is sufficient to support the finding. Moreover, notwithstanding the serious medical and developmental issues facing O.T. and his adoptive parents, the social

worker reports that he is "nice looking" and "very friendly," that he loves books and enjoys playing guitar and keyboard. (The social worker notes that "[r]esearch has shown that some FAS children are very musical.") These facts, as well as his young age and the likelihood that he will be adopted by his prospective adoptive parents, adequately support the court's finding of adoptability.

DISPOSITION

The orders appealed from are affirmed.

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/s/ King
J.

We concur:

/s/ Ramirez
P.J.

/s/ McKinster
J.